Supreme Court, U.S.
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No. 91-2029 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JRR REALTY and HOLLAND HOUSE TENNANTS CORPORATION

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This Memorandum is written in reply to the Answering Brief filed by Respondent National Labor Relations Board. ("NLRB", "Board") It is filed in support of the instant petition for certiorari.

ISSUE PRESENTED

Does this Court desire to reconcile its decision in Golden State Bottling v. NLRB, 414 US 168 (1973) which held that a successor can be liable for a predecessor's unfair labor practice, with its decision in NLRB v. Burns Security, Inc., 406 US 272 (1972) which held that a successor is not bound to the substantive terms of its predecessor's contract, where the predecessor's unfair labor practice is the act of abrogation of its contract?

POINT I

THE BOARD HAS NOT DISTINGUISHED THE CASES CITED BY THE SECOND CIRCUIT

The Board's statement (Ans. Br. Pg 4) that its "...order to make payments to the Union's..." funds, where no proof of loss exists, is based "...on settled law" can only be termed as lacking in candor. As noted in the petition for certiorari, the Second Circuit recognized that two lines of cases were emerging from the Board at the same time. (Pet. for Cert. at 11-12) One line required payments to the funds, another required proof of loss. The Board distinguishes only one of the cited cases in its answer, Colletti Color, 204 NLRB 147 (1973) and that in a manner starkly different from the Board ALJ in this case. (See Pet. App at A-44) The Board does not distinguish any others and does not even deal with the

entire existence of a second strain of decisions noted by the Second Circuit.

In distinguishing Manhattan Eye, Ear and Throat Hospital v. NLRB, 942 F2d 151 (August 15, 1991) the Board notes that in this case "...the employer did not provide substitute, non contractual benefits..." (Ans. Br. at 10) to the employees. Missing from the answering brief is any indication that the employer requested "...that the union permit respondents to provide health coverage to the current employees" (Pet. App. at 36) and that implementation, unilaterally, of another health plan would itself be an unfair labor practice. NLRB v. Katz, 369 US 736 (1962); Clear Pine Moldings, 238 NLRB 69, 79-80 (1978), enforced 632 F2d 721, 729. Surely the Board is not arguing that because the respondent in

Manhattan Eye and Ear, violated the Act by instituting substitute coverage unilaterally, that it therefore is relieved of remedial responsibility. In fact, the Board in that case, and in Clear Pine Molding, supra, provided for the exact remedy that the Second Circuit rejected. Accordingly the Board grasps at a distinction without legal difference.

The Board also argues (Ans. Br. at Pg. 11) that although the discharged employees refused reinstatement they still had an interest in the funds, on which no claims were made, receiving a windfall. There is no record evidence to support the Board's argument that the employees' "...right to receive benefits in the future depends on their having been covered by union contracts for a

specified minimum length of time..." Rather the nature of the windfall becomes plain when the Board notes that "...three of the discharged employees had found other jobs covered by union contracts" and, presumably, had had contributions made on their behalf by the new employers. (Ans. Br. at fn 10)

There is therefore a clear conflict in the duty to make-whole employees where fund contributions are in issue between the Second and D.C. Circuits. See also Rice Lake Creamery, 151 NLRB 1113, 1129; Deena Artware, 112 NLRB 371, 375; Overnite Transportation, 197 NLRB 894, 896 (1972); Southland Dodge, 232 NLRB 878, 879 (1977); Am-Del Co., 234 NLRB 1040, 1043.

POINT II

THE SUCCESSOR, HOLLAND HOUSE, REQUIRES THIS COURT'S RESOLUTION OF THE GOLDEN STATE AND BURNS DOCTRINES OF THIS COURT

The thrust of the petition for certiorari regarding Holland House, the successor to JRR Realty Co, is that the important policy considerations that this Court announced in Burns, supra, preclude requiring a successor to honor a predecessor's labor contract where the predecessor's unfair labor practice was itself the failure to honor a labor contract. The answer (Ans. Br. at 7 fn 7, 8) seriously misreads the petition in asserting that the issue concerning increases in amounts and liquidated damages were areas where "Petitioners do no seek further review." In fact, both issues are specifically raised in the petition (Pet. for Cert. at 21)

Moreover, the Board's elaborate

attempt to explain away this Court's and the Board's holdings that a successor with knowledge of a predecessor's unfair labor practice of failing to honor a contract is bound to remedy the violation only to the day of its takeover (Ans. Br. at 12-14) is faulty by those very findings.

The Board states that under Burns where it is "perfectly clear" that no changes will be made by a successor there is a duty to "consult" with the incumbent union before a successor can make unilateral changes. This freezing of the situation however does not bind the successor to the predecessor's contract terms. Accordingly, while the successor could be required to keep the exact terms in place, there is no requirement that later contractual increases or changes are binding on the successor since these are substantive

contractual terms to which the successor is not bound. Nor can the successor be bound to the contractual provisions of its predecessor to pay liquidated damages, since this too binds the successor to substantive contract terms. Accordingly the Boards attempt to explain away the irreconcilable is unavailing.[1]

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1. The Board incorrectly notes that the successor, Holland House, agreed to honor the predecessor's contract. (Ans. Br. at 13) First, this was in the context of settlement and took place in 1987, three years after the successor's takeover. Secondly, there was no finding below that the successor, in fact, adopted the predecessor's contract terms at any time, much less at its takeover. Similarly the Board errs in asserting that the underlying order in this case specifically required payment to the funds. (Ans. Br. at fn 3) In this regard this underlying order should be compared to those found in the cases cited in the petition for certiorari at page 11. The difference is stark.

CONCLUSION

This Court should grant certiorari so that these two important labor law issues can be properly briefed and determined.

Respectfully submitted,

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September 8, 1992

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